SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1338

DEBORAH A. NORTHCROSS, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

ERNEST G. KELLY, JR.
EVANS, PETREE, COBB & EDWARDS
900 Memphis Bank Building
Memphis, Tennessee 38103
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Counter Statement Of Questions Presented 2

Statement Of The Case 2

Reasons For Denying The Writ Of Certiorari—

The Evidence Supports The Findings Of The District Court 5

Conclusion 11

Table of Authorities

CASES

Bradley v. *School Board of Richmond*, 462 F. 2d 1058, 36 L. Ed. 2d (1973) 11

Goss v. *Board of Education*, 482 F. 2d 1024 (6th Cir. 1973), cert. denied, 42 U.S.L.W. 3423 (Jan. 21, 1974) 11, 12

Graver Tank and Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 9

Kelley v. *Metropolitan County Board of Education*, 463 F. 2d 732 (6th Cir.), cert. denied, 409 U.S. 1001 (1972) 11

Mapp v. *Board of Education*, 477 F. 2d 851 (6th Cir.), cert. denied, 42 U.S.L.W. 3290 (Nov. 12, 1973) 12

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 5, 6, 13

OTHER AUTHORITIES

Rule 52a, Federal Rules of Civil Procedure 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1338

DEBORAH A. NORTHCROSS, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

OPINIONS BELOW

The certiorari petition correctly lists the reported Opinions in this case.

JURISDICTION

The jurisdictional requisites are adequately set forth in the certiorari petition.

COUNTER STATEMENT OF QUESTIONS PRESENTED

The basic issue presented in this cause is whether the District Court and the Court of Appeals for the Sixth Circuit were correct in determining that the Final Plan of Desegregation approved as "Plan Z" represents the greatest feasible amount of desegregation that can be achieved in the Memphis School System in light of the practicalities of the situation. Respondents submit that the decisions of the lower courts are correct and that certiorari should be denied.

STATEMENT OF THE CASE

Proceedings in this cause arise out of the August, 1972, Order of the United States Court of Appeals for the Sixth Circuit affirming the District Court's requirement of a Plan of Pupil Desegregation designated as "Plan A", and requiring that the District Court implement a further Plan of Desegregation to achieve a unitary school system, 463 F. 2d 329, cert. denied, 410 U.S. 926 (1973).

At the time of that Order the Memphis City School System had a total enrollment of approximately 131,268 students of whom 58 per cent were black and 42 per cent were white.

These instructions of the Court of Appeals were carried out in the course of the 1973-4 school year. Plan A of desegregation, which involved the first substantial pupil transportation carried on by the Memphis School System, was put into effect in January of 1974 at the beginning of the second semester. This plan anticipated the transportation of approximately 14,000 students. The District Court

also directed the Board of Education to have prepared a Plan of Further Desegregation. This plan was prepared by a bi-racial team designated by the Board.[1] Various alternative plans were developed by the team and the Board ultimately recommended to the District Court Plan II which was adopted by the District Court and renamed "Plan Z" in the hope that this will prove to be the terminal plan for this long standing problem in the City of Memphis.[2] Plan Z projected approximately 39,000 pupils to be transported. The Board also filed two alternative elementary plans of desegregation which had been developed by the team and one alternative secondary plan. At the hearing which began on April 18, 1973, the petitioners sought to have the District Court adopt a combination of these plans designated as Plan I-III subject to certain modifications proposed by their witness, Dr. Gordon Foster.

Contrary to the petitioners' view, the evidence of this hearing and the finding of the District Court contained strong and conclusive reasons for rejecting the petitioners' request. It was clearly established that the plans favored by the petitioners would have resulted in substantially greater times and distances of transportation in detriment of the best interests of the school children, and cause substantial additional burden on the school system. It was also shown that these plans would result in the dismantling of the large number of desegregated schools which had been achieved in earlier stages of the desegregation process and by the pairings and clusterings involved in Plan A.

---

1. The white members of this team were Dr. O. Z. Stephens, The Director of Research and Planning for the Board, and Dr. John Rutland, the Principal of Oakhaven High School. The black members of the team were Dr. William Sweet, the Principal of Riverview Junior High School, and Mr. Charles Patterson, the Director of Race Relations.

2. May 3, 1973, Opinion of the District Court, Page 32a, Petitioners' Appendix.

Dr. Leon Lebovitz, Director of Psychological Services for the school system, testified to the importance of limiting the amount of pupil time consumed by the transportation system.[3] As Dr. Lebovitz points out, no absolute cut-off point can be determined since individuals differ in their degree of tolerance to stress, but the District Court was clearly supported in its desire to avoid excessive times and distances of transportation.

Contrary to the petitioners' view that there was no unanimity among the members of the desegregation team, it was made clear at the hearing that the team viewed the times and distances in the plaintiffs' plan as excessive. Dr. Sweet who had personally prepared elementary Plan III stated that the times and distances in that plan were improper and concluded that he would not recommend this plan.[4] As shown in this portion of Dr. Sweet's testimony, the development of the plan did not signify the team's opinion that it was educationally sound. Plan III was developed at the request of one Board member who wished to see a plan which would affect every school in the system regardless of the times and distances or other practicalities which might be involved. The petitioners also misconstrue the remarks of the superintendent, Mr. John Freeman, when they suggest at page 10 of their petition that he had no personal or professional objections to the specific plans proposed by the plaintiffs. A review of the context of Mr. Freeman's remarks makes it clear that he had no objections to the process of school desegregation itself or to the idea of desegregating all attendance units if that were feasible. However, he then expressed his concern about the objectionable features of petitioners' plans in

---

3. Tr. of Hearing, April 18, 1973, 444-8.
4. Tr. 163; 167-8.

terms of time and distance, cost and student fatigue and stated that he favored the plan recommended by the Board.

After an exhaustive and thorough consideration of the plans, and the practicalities bearing on the feasibility of the various plans, the District Court agreed with the great weight of the expert testimony at the hearing and approved the plan which had been suggested by the Board of Education. The team subsequently prepared exact boundary lines for the various satellite zones called for in the plan and submitted these zones to the District Court where they were approved. Plan Z was put fully into effect at the beginning of the 1973-4 school year, and the United States Court of Appeals for the Sixth Circuit has affirmed the District Court in approving this plan as a final plan of desegregation in this prolonged controversy.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Evidence Supports The Findings Of The District Court

The District Court in the present case has diligently performed the precise function which was commended to the lower courts in the case of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). In that case, this Court recognized that the district courts must perform their traditional equitable function in weighing the advantages and disadvantages of competing plans of desegregation:

> "District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with

> many factors, but probably with none more than the age of the students. The reconcilation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more than remedial measures courts of equity have traditionally employed." 402 U.S. at 575.

In the present case, the District Court thoroughly considered the competing plans of desegregation and found compelling reasons for rejecting the plans favored by the petitioners. These reasons included the critical factor of time and distance of transportation. It was undisputed that the plans recommended by the Board of Education were greatly preferable in minimizing the factor of time and distance. The plans favored by the petitioners included one-way distances ranging up to 17.5 miles as shown by Trial Exhibit 1. Many of the distances in petitioners' plan exceeded the longest distances in former Plan B which had been rejected by the District Court following the April, 1972, hearing and which had previously been found to create "some times and distances or routes of transportation in this system which apparently would not comply with the standards of *Swann*.[5] As further shown by Trial Exhibit 1, the plans favored by the petitioners would not only involve one-way times in excess of 45 minutes but would place the great bulk of all transportation times in a category of 31 to 45 minutes each way. By contrast, the plan adopted by the District Court has succeeded in greatly reducing the number of 31 to 45 minute routes and eliminating altogether routes in excess of 45 minutes.

This success is not only of benefit in minimizing student fatigue and inconvenience but will also minimize the

---

5. Memorandum Decision, November 15, 1972, P. 9.

staggering of opening and closing times which will be necessary to accommodate the bus schedules.[6]

The evidence also supported the District Court in finding that the petitioners' plans would have a vast adverse effect on existing desegregated schools. Throughout the process of devising plans, the District Court has recognized the desirability of maintaining and encouraging existing school desegregation. In its Decision of December 10, 1971, the Court noted: ". . . it appears to be beneficial to take advantage of the willingness of the citizens of that area to accommodate desegregation without a total change of racial patterns in the residential and school populations."[7] Similarly, the Court in adopting Plan A stated that this plan might serve as a basis for further desegregation, but gave no indication that it intended to dismantle the desegregation accomplished either by Plan A or by the natural desegregation of neighborhoods. In keeping with this position, the desegregation team adopted as one of its criteria the desire to maintain existing desegregated situations wherever possible.[8] As Dr. O. Z. Stephens noted, the team was unanimously in accord with this proposition.[9] The testimony of Mr. Freeman showed that such an approach was particularly desirable in light of the tremendous efforts which had been made by community organiza-

---

6. In order for buses to make multiple runs, it is necessary to have enough interval between school openings to allow the buses to get from one school to the next school. Thus, predominance of routes of 30 minutes or less has led to opening times being staggered at 30 minute intervals in the present school year. A predominance of 45 minute routes would mean 45 minute intervals between school openings and would aggravate the problem of children going to school and returning home in the dark.

7. Memorandum Decision, P. 20.

8. Report To The Court, January 15, 1973.

9. Tr., April 18th, P. 21. This approach was further endorsed by both Dr. Sweet and Superintendent John Freeman, Ibid. 167 and 483.

tions, individual persons, and numerous school communities which had made door-to-door efforts to encourage parents to continue to patronize the public schools.[10] Fortunately, it was possible in Plan Z to retain the great majority of existing desegregated situations and avoid requiring the communities which had been successfully desegregated under Plan A to undergo a further restructuring. By contrast, the petitioners' plan would have retained only two of the pairings which were implemented as part of Plan A. It would have dismantled and reassigned almost all of the other instances of existing desegregation.[11] It should also be noted that the disadvantages of doing away with the desegregation achieved by Plan A would be compounded many times over if the decision of the District Court were to be reversed at this late date. Instead of affecting only the number of schools which were desegregated prior to the adoption of Plan Z, the petitioners are now proposing to revise existing attendance patterns throughout the school system with the result that the very large number of schools paired and clustered under Plan Z of desegregation would be completely reworked. This process, coming at the end of three years of intensive reassignment of faculties and two years of new desegregation plans, would create unimaginable disruption in the public school system.

---

10. Tr. 480-481.

11. See Ex. I. A typical example of Plan A pairing can be seen in the midtown area involving Idlewood and Rozelle Elementary Schools under Plan A. These schools were successfully paired and succeeded in maintaining a substantially bi-racial, majority black student body, thanks to a large degree of neighborhood involvement and work with parents and community groups. Plan Z maintains this pairing and allows this instance of successful desegregation to continue. The petitioners' plan would dismantle the pairing so that the Rozelle children would be paired with former white Grahamwood in East Memphis, and Idlewood paired with Orleans Elementary School in the inner city.

It was further found by the District Court that the plan favored by petitioners would involve substantially greater cost. It would involve greater total cost of the plan and—because of the substantially longer distances—a greater cost per pupil. This cost would have to come out of the operating budget of the school system which is chronically under-financed and in which fixed costs plus salaries consume in excess of 90 per cent of the Board's budget, leaving only a small fraction in total budget which must cover such items as transportation and school maintenance.[12]

Based on these findings, the District Court was clearly correct in finding that Plan Z represented the greatest feasible amount of desegregation in the Memphis School System and in fashioning the appropriate equitable remedy. These findings have now been approved by the Court of Appeals for the Sixth Circuit and are entitled to the conclusive weight which this Court has historically accorded the concurrent findings of fact by two lower courts:

> "A court of law, such as this Court, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275

Although the petitioners contend that the District Court improperly considered "white flight" in reaching its conclusion, it is clear from a reading of the Opinion that the District Court did no more than recognize that the objectionable features of petitioners' plan—such as its undue disruption of existing desegregation, its unreasonable times and distances, and its excessive financial costs—would not

---

12. Tr. 379-380; 484-488.

only impinge on the educational process generally but would have additional undesirable consequences on the desegregation process itself. In taking all proper and feasible steps toward further desegregation of the schools, neither the District Court nor the Board itself has been deterred by adverse reaction in the community to the desegregation plan. On the contrary, the companion appeals in this very case show that the District Court and the Board of Education have consistently discharged their duties in spite of attempts at boycott, economic penalization, denial of gasoline supply, and a threat on the part of the Mayor of the City of Memphis to remove the buses from the streets at the time of the implementation of Plan A. In spite of these factors and in spite of the decline of enrollment from 131,238 prior to the implementation of Plan A and Plan Z, to a total of 119,399, at the present time, the District Court has steadily required compliance with the appropriate plan of desegregation. Its refusal to adopt the excessive times and distances in petitioners' plan and to countenance the attendant disruption of existing desegregation should not be equated with improper consideration of white flight.

Respondents would also point out that the District Court was presented in this case with a logistical situation in which the construction of a plan of desegregation presented unusual difficulties. The very size of the Memphis School System, which is one of the 10 or 12 largest school systems in the country, and which is totally within a high traffic urban area, presented unusual problems in times and distances of transportation. Moreover, the geography of the City, which is cut off on the south by the state line and on the west by the Mississippi River, results in the main areas of black population being located on one extreme side of the school system and, thus, causes greater times and distances of transportation than would be in-

volved if the inner city were surrounded by areas of white residents, as in *Kelley* v. *Metropolitan County Board of Education*, 463 F. 2d 732 (6th Cir.), cert. denied, 409 U.S. 1001 (1972). Under these circumstances, it is scarcely surprising that a remaining number of schools of the majority race which were located in the most inaccessible areas of the city could not feasibly be included in a plan of desegregation.[13] Compare *Goss* v. *Board of Education*, 482 F. 2d 1024 (6th Cir., 1973), cert. denied, 42 U.S.L.W. 3423 (Jan. 21, 1974). One of the principal differences between the instant case and Goss is that no transportation system was required of the Knoxville School Board; whereas, the respondents have fully implemented an enormous transportation system within a former neighborhood school system.

Respondents would further show that there is no merit to petitioners' argument that the District Court failed to make findings of fact in support of its decision. This argument was not raised in the respondents' brief in the Court of Appeals and is merely an effort to avoid the impact on this case of Rule 52a of the Rules of Civil Procedure. The District Court made substantive findings with regard to the adverse impacts of petitioners' plan and these findings

---

13. Contrary to petitioners' position that all one-race schools in the system have been held to be vestiges of the dual school system, the lower courts have held only that "many of the one-race schools are clearly the result of discriminatory action of the school board . . ." 466 F. 2d 890, 893. The schools which were not included in Plan Z are located in an extensive area of concentrated black housing in the westernmost part of the city and are removed from other portions of the city by tiers of former all-black school zones. Given this geographic isolation, they are identical with the situation in *Bradley* v. *School Board of Richmond*, 462 F. 2d 1058, affirmed by equally divided Court, 36 L. Ed. 2d ....., 1973, in which the Court noted that "The root causes of the concentration of blacks in the inner city are simply not known . . . Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend." 462 F. 2d at 1066.

should not be set aside merely because petitioners choose to disagree with them or to insist on a demonstration that implementation of their plan would have been a physical impossibility. The Court of Appeals was equally correct in concluding that the District Court's factual findings were entitled to the benefit of Rule 52a. See *Goss*, supra. See also *Mapp* v. *Board of Education*, 477 F. 2d 851 (6th Cir.), cert. denied, 42 U.S.L.W. 3290 (Nov. 12, 1973).

CONCLUSION

In the last five years, the very large public school system in the City of Memphis has experienced continual upheaval in an effort to implement a final plan of desegregation and to achieve a unitary school system. During the years 1969-70, 1970-71 and 1971-72, the system has experienced the widespread transfer of teachers to achieve a racially balanced faculty in every school in the system. In January of the 1972-73 school year, Plan A of desegregation was implemented and students and faculty were reassigned at approximately one-third of the system's schools. Finally, at the beginning of the current school year, Plan Z was put into effect and the great majority of the remaining schools experienced large scale transfers of students and faculty members. At all times, the Board has proceeded to implement with the utmost good faith the various directives of the District Court and of the Appellate Courts. Finally the point has been reached at which the District Court, supported by overwhelming evidence, has concluded that the school system has done its utmost within the limits of feasibility and should be allowed to redirect its efforts to meeting the educational needs of its patrons. This has occurred only after full utilization of all of the remedial measures permitted by the *Swann* decision. A great majority of the schools have been paired, clustered

or otherwise restructured. The faculties at all schools have been racially balanced and a former neighborhood school system has been converted into an operation involving substantial pupil transportation. Respondents submit that the courts below have fully considered and applied the remedies of the *Swann* decision and that certiorari should be denied.

Respectfully submitted,

ERNEST G. KELLY, JR.
EVANS, PETREE, COBB & EDWARDS
900 Memphis Bank Building
Memphis, Tennessee 38103
Attorneys for Respondents